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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AMERICAN BROADCASTING COMPANIES,
4 INC., et al.,

Plaintiffs,

v.

19 Cv. 7136 (LLS)

6 DAVID R. GOODFRIEND, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.
10 January 31, 2020
3:35 p.m.

11 Before:

12 HON. LOUIS L. STANTON,

13 District Judge

14 APPEARANCES

15 WILLIAMS & CONNOLLY LLP
Attorneys for Plaintiffs

16 BY: GERSON A. ZWEIFACH
THOMAS G. HENTOFF

17 ORRICK, HERRINGTON & SUTCLIFFE LLP
18 Attorneys for Defendants

19 BY: R. DAVID HOSP
ELIZABETH E. BRECKMAN

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(In jury room)

THE COURT: Tell me where we stand.

MR. ZWEIFACH: Since we saw you on November 1, we have actually made progress.

THE COURT: Good.

MR. ZWEIFACH: We represent the four networks. We brought suit on grounds that the defendant was retransmitting our programming over the internet without authorization. We were met with counterclaims and we had filed a motion to dismiss, and that's how things stood when we first saw you.

I remember at the conference your Honor suggested that we think about a way to advance the issue of whether the exemption in the copyright statute that the defendant was invoking indeed applied, and that if we tried that issue, the others might drop out or sort out over time.

THE COURT: That's where we left it.

MR. ZWEIFACH: So we actually took the nudge and we spent time working together productively, and we reached an agreement that doesn't just advance that issue, the central issue of the copyright exemption, but actually leaves it as the principal issue left in the case. So what happened was we --

THE COURT: It's the one left.

MR. ZWEIFACH: What happened is we abandoned any claim to damages from Mr. Goodfriend personally. That was another nudge I felt. The defendants dropped their counterclaims and

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1 affirmative defenses, except for, of course, the copyright
2 exemption and a state law and federal law personal immunity
3 that applies to Mr. Goodfriend.

4 MR. HOSP: Just to be clear, nobody has amended any of
5 the pleadings or anything like that, and I don't think we
6 intend to at this point. I think what we are intending to do
7 is move forward on the 111(a)(5) defense, and as a practical
8 matter, that's likely to resolve the case.

9 THE COURT: Yes.

10 MR. ZWEIFACH: In light of that, and we have an
11 agreement to this --

12 THE COURT: It's just coming out sort of through the
13 backdoor instead of the front door. That's fine.

14 MR. ZWEIFACH: And we agreed as well that one of the
15 purposes of this was not just to give us a shorter and clearer
16 path to a trial or to a disposition, but also to narrow
17 discovery in a way.

18 THE COURT: Yes. And you can defer the other
19 discovery without it rotting away.

20 MR. ZWEIFACH: I don't think it will happen. I think
21 we have agreed to abandon those claims. But what we are doing
22 is we agreed that certain things will be the subject of
23 discovery and certain things will be off limits, as much as we
24 can.

25 So we are in a good place where we are going to move

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1 ahead. So I know I speak for Ms. Hosp when we thank you for
2 the nudge because it worked out.

3 THE COURT: Good.

4 MR. ZWEIFACH: I will say that Ms. Hosp and Ms.
5 Brenckman were good partners and incredibly professional and
6 creative in getting this done. So we worked together and we
7 got something complicated accomplished.

8 THE COURT: What kind of discovery will you need?
9 Regardless of what side you are on, what do you need to work
10 out the answer to that question?

11 MR. ZWEIFACH: So from our end, some of the discovery
12 would be about whether and to what extent there is sort of any
13 purpose of commercial advantage that is accruing to either
14 defendant entity or Mr. Goodfriend personally, or in our view
15 of the law, affiliated distribution partners.

16 So we will look into that. We will look into to what
17 extent, when this was pitched to people who have taken the app
18 and put it on their service, whether it was pitched as
19 something of a commercial advantage.

20 THE COURT: This had to do with his past behavior; is
21 that where that answer is found?

22 MR. ZWEIFACH: I think the answer will be found in
23 their documents and in the documents of those that he raised
24 money from or have become distribution partners. So they have
25 taken this internet application and now it's going across the

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1 country on Pay TV, set-top boxes, and other places.

2 THE COURT: Does what he did with the money matter?

3 MR. ZWEIFACH: Not ultimately, not personally. The
4 statute is phrased in terms of any purpose of commercial
5 advantage, direct or indirect. So I don't think I have to show
6 that he ended up with a yacht. I think what I need to show is
7 that he or his distribution partners were pursuing a commercial
8 advantage through this entity. So we are going to look into
9 that. Then there is going to be discovery from us that I know
10 is coming.

11 THE COURT: It really goes to his goals.

12 MR. ZWEIFACH: Any goal of it, yes.

13 So it's an intent issue in part. So it's
14 fact-sensitive. Which is how we end up with jury trials of
15 interesting cases.

16 So what we have crafted is a schedule that reflects,
17 and we are very far along --

18 MR. HOSP: I think we have come to a resolution of
19 this that is --

20 THE COURT: Manageable.

21 MR. HOSP: It's manageable, and it was helpful, and I
22 thought we worked together very well. We still are going to
23 have some disagreements, obviously. I think in terms of one of
24 the central issues here is what is meant by direct or indirect
25 commercial advantage. And ultimately when it comes to

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1 discovery, I will be clear that a lot of I think what is being
2 sought --

3 THE COURT: "Direct or indirect commercial advantage,"
4 those are the words?

5 MR. HOSP: Those are the words in the statute. And
6 ultimately we will make clear that some of what is being sought
7 in discovery we think goes beyond what is relevant. But that
8 said, Mr. Goodfriend came in to this case knowing that all of
9 the discovery was going to be taken. We may have fights over
10 what is relevant, what is admissible ultimately, but I don't
11 think that we intend to have a lot of disputes about what it is
12 we are going to hand over, because ultimately Mr. Goodfriend's
13 goal here is to be absolutely transparent. He is somebody who
14 has been involved in public service for his entire career,
15 going back to serving within the government, serving with the
16 FCC, within the White House, and starting other nonprofits, the
17 goal of which was to help the public. And the same is true of
18 the others on the board.

19 So the goal here is to cut through all that. We will
20 also, obviously, take discovery and we want to see what
21 documents they have related to Locast and things like that, and
22 the organizations that they belong to and things like that,
23 what they have had to say about various different aspects of
24 this. But our goal is to, again, be very transparent and be
25 very quick with discovery.

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1 THE COURT: When I was practicing, I would say quickly
2 that I devoted a decade of my life, and a little slower and
3 more careful it might be more than a decade, to the antitrust
4 decree entered against United Shoe Machinery Corporation in the
5 antitrust case. The upshot of that long trial, long opinion,
6 was a selection of a day, ten years after the entry of the
7 judgment, in which the situation in the industry would be
8 reviewed with an eye to determining whether workable
9 competition had been brought into the situation. And we went
10 through that process and had that review, and everybody thought
11 they knew what workable competition meant, but it turned out
12 that it is not a recognized economic term. The economist said
13 we can't give it any content at all. It was simply something
14 that was a kind of a useful framework of thinking more than
15 having any meaning of its own.

16 And that may be true with your words about the
17 commercial advantage. It may not possess a definition, but
18 simply be sort of a mode of behavior. And if that's the case,
19 I am just asking, as a matter of curiosity, it may be that the
20 better way of going at it is by a deposition, and depositions
21 of the people dealing with the business, and seeing what that
22 concept means as applied to what they do, much more than as
23 establishing an abstract goal or standard of its own. It never
24 bothered us that nobody knew what workable competition meant
25 because we all knew well enough to get through the day and

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1 organize the evidence. But the more I think as I look back on
2 it, it's really not found in the dictionary, it's found in the
3 facts, and then you emerge from your study of the facts and
4 say, well, it is there or it is not there.

5 MR. ZWEIFACH: I think that is probably right. This
6 is a case that will be very fact-sensitive.

7 So we have an order. And we are in agreement on
8 almost everything, consistent with a few good months.

9 So we have fact discovery laid out and a schedule for
10 expert discovery and all of that.

11 THE COURT: The experts being experts in what?

12 MR. ZWEIFACH: One of the issues that has been raised
13 in part by Locast is they contend that is one of the reasons
14 that they are doing what they are doing. So the relevant
15 phrase is "any purpose of direct or indirect commercial
16 advantage." So "purpose" is part of it. And one of their
17 purposes is they say that broadcast television doesn't --
18 insufficient resources have been devoted to making the signal
19 as strong and as penetrating as it could be. So one of the
20 reasons he is retransmitting over the internet is to reach
21 people who can't be reached.

22 So one of the things that we may have some expert
23 testimony on is the ways in which the FCC really governs what
24 your broadcast signal is, how far it can reach, and subjects
25 like that, and whether and to what extent they are actually

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1 filling in those gaps, or whether, in fact, they are doing
2 something else which is more commercial in nature. So that's
3 an area that a trier of a fact may benefit from hearing because
4 it's a little bit technical. That's the nature of the beast.

5 So the only area where we have a difference here is
6 they propose building into the back of the schedule a briefing
7 schedule for summary judgment motions, and I am not suggesting
8 that either side -- obviously, no one is saying they can't file
9 one or that we can't file one, either side may file them. Our
10 wish is that if one is filed, we will deal with it then and a
11 briefing schedule will be set. But our hope is, instead of
12 extending a schedule to allow for summary judgment motions, as
13 plaintiffs, where from our perspective the infringement -- he
14 has been expanding even since we saw you November 1 into more
15 cities and more parts of the country, more subscribers, so we
16 are eager to get to trial and hopefully a final injunction,
17 which is what the parties have agreed, that if they don't have
18 the exemption, an injunction should be issued. So we are eager
19 to get there sooner rather than later. But the difference
20 between us is including a briefing period for summary judgment
21 or not, and it effectively extends the schedule four to six
22 weeks. That's the entire difference in the order.

23 THE COURT: The better policy, and it conforms to the
24 policy of the federal rules really with regard to litigation,
25 is normally coming without a summary judgment, although that's

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1 counterfactual these days, but to set up a schedule to get us
2 between here and trial, with the recognition that that schedule
3 may be derailed by a motion for summary judgment at whatever
4 time things seem to be ready for that, if there is to be one.
5 So it will grow naturally as life goes on.

6 MR. ZWEIFACH: That was our position.

7 MR. HOSP: Your Honor, I think what we are
8 anticipating in this case is that ultimately there really are
9 not going to be that many true factual disputes. The financial
10 records are going to be what the financial records are. The
11 FCC records on broadcast coverage and the usage --

12 THE COURT: Well, we talk about stipulations of fact.

13 MR. HOSP: Having sort of done cases like this a
14 number of different times, my guess is that even though the
15 facts are not going to be disputed, and we may be able to come
16 to some stipulations about financial records and things like
17 that, what we have experienced, literally with similar
18 plaintiffs and defendants, is when you try to distill
19 stipulations of facts into language, it becomes a battle of
20 characterizations --

21 THE COURT: It certainly does.

22 MR. HOSP: -- that nobody can ever agree on.

23 So it's our anticipation that we are going to come to
24 a point where you are going to be able to look and see what the
25 underlying facts are, even though we can't necessarily come to

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1 an agreement on how to characterize those facts. And I could
2 be wrong, but my guess is we are going to come to the end of
3 the day and when it comes to any notion of commercial
4 advantage, the underlying facts are going to be pretty well
5 established and not particularly disputed. It's just the other
6 side will call that a commercial advantage and we will
7 disagree, and that may end up being more of a question of law
8 than a question of fact.

9 MR. ZWEIFACH: I just have to say I do think your
10 Honor is right when you suggested that the phrase that we are
11 wrestling with here, "any purpose of direct or indirect
12 commercial advantage," there is not a lot of teaching in the
13 cases about it. It will be hard for somebody to give you a
14 rigid definition of it, and it may ultimately be a very
15 fact-sensitive exercise where the meaning of that phrase will
16 have to be effectively determined by a trier of fact seeped
17 into the details. And I think that's how it plays out. There
18 may be motions on pieces of this, but I think you're right when
19 you suggested and analogized it to working levels of
20 competition. This is going to be a phrase that will take on
21 meaning and texture in the world of facts that we will bring to
22 you or to the trier of fact.

23 So in any event, that's the difference in the
24 schedule.

25 THE COURT: I think that probably is correct. You

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1 can't apply it prospectively as a standard. It's really an
2 epithet applied to a bunch of facts and you look at it and say,
3 is that this or isn't it, and everybody knows what you're
4 talking about.

5 MR. ZWEIFACH: So that's the only difference.
6 Otherwise all the other dates are set up and agreed to. And in
7 our schedule we would be ready for a trial at the end of this
8 calendar year, and theirs the summary judgment motion would be
9 at the end of that calendar year and then we would be into the
10 following. So we are eager to get there.

11 THE COURT: By the time we get to trial, we will know
12 how to try it. These things work themselves out. Something
13 that you thought was important turns out to be immaterial.

14 MR. ZWEIFACH: We eliminated about half the case in
15 two months. We have made progress. We are capable of it. So
16 that's good.

17 THE COURT: My form of 16(b) order was really not
18 designed for this case.

19 MR. ZWEIFACH: Well, we followed it anyway. When
20 judge set up forms, we use them.

21 THE COURT: Let me take a look at it.

22 MR. ZWEIFACH: Is that the same one?

23 This is the new one that we signed. You won't see any
24 differences till you get pretty far along. Page 5 and 6 there
25 is a little divergence.

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1 THE COURT: I would be inclined to get in the
2 depositions early. You are going to get much more out of them
3 than documents, and you use the documents with the witness and
4 you ask him what records he kept and what he expressed and what
5 he said and documents drop out of your lap.

6 When you say plaintiff's industry, you both know what
7 you mean?

8 MR. ZWEIFACH: Right. The broadcasting industry.

9 THE COURT: I would take it as a question about his
10 personality. Does he get up early in the morning?

11 Thinking back again to that United Shoe, where the
12 industry was about a dozen kinds of machines that performed
13 operations and the kind of operation you wanted to rent a
14 machine for depended on the type of shoe you were making and
15 things like that, it was very hard to isolate them so that you
16 could define the amount of competition for each item. I must
17 say, looking back on it, I think the most useful thing was not
18 so much the testimony of the experts, they helped you organize
19 the facts and they worked on that hard and made a chart of how
20 the facts could describe the industry and allow you to deal
21 with separate segments. And that isn't normally advertised as
22 the use of the experts, but, boy, they can be very useful.

23 I think I detect in this more than the normal desire
24 on the part of counsel to have the deadlines be deadlines and
25 not be just movable, adjustable estimates, and I must say I

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1 respect that. I think the motive is excellent. The moral is
2 that if they are to be regarded without much seriousness, you
3 can't make them too far into the future because you don't have
4 enough information. Speaking for myself, I am somebody who
5 doesn't have to do the work and therefore is naturally ignorant
6 in what it really should take. And I think the thing to do
7 here is to go up to page 5 as is and cut it off there, and we
8 will have a conference this summer. We will know how it's
9 going then. You will be much more in command of what has been
10 done and what still is to be done. We will all be just as
11 smart then as we are now. We will be much better informed.
12 And that's the time to talk about when we will do the other
13 things and heading towards trial.

14 Then I would pick it up at H, pick up those two
15 things. Then all this about summary judgment is simply cut
16 out, and when you think it is time to make summary judgment,
17 write me and say so, laying out the ground, and we will talk
18 about it then. We don't know enough to be able to say these
19 things as it is worded.

20 Then the discovery of experts, it is probably useful
21 to leave that in.

22 I kind of like the stuff on page 8. It's more or less
23 precatory and gives you guidance anyhow. So I would resume on
24 item 4 on page 7.

25 I would take off page 10 I think. It scares me to say

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1 when I will intervene or when I won't.

2 MR. ZWEIFACH: We actually picked that up from your
3 form. We put the scary language in from you, that is where we
4 got it from. That was from the form.

5 THE COURT: These footnotes?

6 MS. BRECKMAN: No. I drafted that.

7 THE COURT: We will set a date now.

8 Let's go off the record because I don't want you to be
9 answering with a thought that you might be quoted or held to
10 your thought sometime.

11 (Discussion off the record)

12 MR. ZWEIFACH: When do you want us back?

13 THE COURT: I want you back after the completion of
14 fact discovery. You will know by that time a lot more of the
15 case, a lot more of who is going to say what, a lot more of the
16 general shape of the facts and the lines of reality along which
17 you're going to be submitting it to the jury. Therefore, a
18 discussion of how it stands and looks then may very much color
19 what you end up wanting from the experts. So we will save
20 money by doing it at this point.

21 That would mean between June and September. I am
22 pretty open.

23 MR. ZWEIFACH: Fact discovery closes June 18 and the
24 expert reports are July 17. So if we are going to save some
25 money --

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1 THE COURT: We want to do it in June. Any date we
2 pick now is to the best of your ability. Try not to pick one
3 in which a member of the family is getting married or a reunion
4 that you want to get to.

5 MR. GOODFRIEND: Your Honor, I promised not to speak
6 except for one thing. My older son is graduating from
7 university.

8 THE COURT: Let's steer around that.

9 MR. GOODFRIEND: If it will be OK for the Court and
10 opposing counsel.

11 THE COURT: But you know when that is.

12 MR. GOODFRIEND: Yes, your Honor. I think it's May
13 18.

14 THE COURT: If we want to do it early, we can do it on
15 Friday, June 5. Then the judicial conference takes me out
16 pretty much the following week. Then there is Friday, June 19.

17 MR. ZWEIFACH: The 19th would be good because we will
18 be done with fact discovery.

19 MR. HOSP: I know that I have 30th college reunion. I
20 believe it's either on the 19th or the 26th.

21 THE COURT: The Fridays are not engraved in stone. If
22 there is a reason for moving it to another, we will do it some
23 weekday afternoon because Fridays in the summer have other
24 needs. This will give us a point around which we can satisfy
25 whatever.

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1 MR. HOSP: So we are putting down the 19th or the
2 26th?

3 THE COURT: The 19th. How about 12 noon? So anybody
4 who doesn't have their calendar can remember it easy. We will
5 regard this as a kind of default day; in case nobody has
6 changed it for any reason, this is where we will end up.

7 MR. ZWEIFACH: Good. Thank you, your Honor.

8 MR. HOSP: Thank you, your Honor.

9 (Adjourned)